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IN THE

Supreme Court of the United States

October Term, 1954.

No. 163.

CHARLES LAWLOR and MITCHELL PANTZER, Co-Partners Trading as INDEPENDENT POSTER EXCHANGE,
Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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INDEX TO BRIEF.

	Page
OPINIONS BELOW	1
STATUTES INVOLVED	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. The Dismissal With Prejudice of the Prior Action Is Res Judicata and a Bar to This One	11
II. The Alleged Co-Conspirators Who Were Not Made Parties to the Prior Action May Also Rely on the Defense of Res Judicata	16
III. Petitioners Are Estopped From Maintaining the Present Action by Their Acceptance, Renewal and Retention of the Benefits of Their Sublicense From National Screen	21
CONCLUSION	25

TABLE OF CASES CITED.

	Page
Adriaanse v. United States, 184 F. 2d 968 (2d Cir. 1950)	18
Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892 (1942)	20
Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U. S. 111 (1912)	18, 20
Bruszewski v. United States, 181 F. 2d 419 (3d Cir. 1950), cert. denied, 340 U. S. 865 (1950)	17, 18, 21
Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co., 248 U. S. 55 (1918)	19
Chipman v. Montgomery, 63 N. Y. 221 (1875)	24
Coca Cola Co. v. Pepsi Cola Co., 36 Del. 124, 172 Atl. 260 (1934)	18
Connecticut Importing Co. v. Frankford Distilleries, 101 F. 2d 79 (2d Cir. 1939)	13
Dickerson v. Colgrove, 100 U. S. 578 (1879)	24
Emery v. Fowler, 39 Me. 326 (1885)	21
Good Health Dairy Products Corp. v. Emery, 275 N. Y. 14, 9 N. E. 2d 758 (1937)	18
Insurance Co. v. Mowry, 96 U. S. 544 (1877)	24
Jones v. Valisi, 111 Vt. 481, 18 A. 2d 179 (1941)	20
Lawlor v. Loewe, 235 U. S. 522 (1915)	13
Mahoning Investment Co. v. United States, 3 F. Supp. 622 (Ct. Cl. 1933), cert. denied, 291 U. S. 675 (1934)	24
McLean v. Clapp, 141 U. S. 429 (1891)	22
Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. 63 (8th Cir. 1907)	20
Ryerson v. United States, 312 U. S. 405 (1941)	25
Silva v. Brown, 319 Mass. 466, 66 N. E. 2d 349 (1946)	20
Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd., 185 F. 2d 196 (9th Cir. 1950), cert. denied, 340 U. S. 943 (1951)	23
United States v. Bausch & Lomb Optical Co., 321 U. S. 707 (1944)	8
United States v. International Building Co., 345 U. S. 502 (1953)	14
United States ex rel. The International Contracting Co. v. Lamont, 155 U. S. 303 (1894)	22
United States v. Parker, 120 U. S. 89 (1887)	13, 14

AUTHORITIES CITED.

	Page
2 Freeman, Judgments § 757 (5th ed. 1925)	13
Restatement, Contracts § 516(e) (1932)	8
Restatement, Judgments § 46, comments a, b (1942)	14

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OPINIONS BELOW.

The opinion of the district court (R. 76) is not reported officially but is reported in CCH Trade Cases [1952-1953] ¶ 67,619. The opinion of the court of appeals (R. 153) is reported at 211 F. 2d 934.

STATUTES INVOLVED.

The claim asserted by petitioners in their prior suit and here is a claim purporting to arise under the antitrust laws, but the questions presented do not involve the interpretation or application of those laws.

QUESTIONS PRESENTED.

1. Where petitioners earlier sued for injunction and damages under the antitrust laws, charging that certain exclusive contracts between National Screen and the producer respondents constituted a conspiracy violative of the Sherman Act, and then settled their claim by entering judgment of dismissal with prejudice and accepting a sublicense to distribute National Screen's products manufactured by it under then-existing as well as subsequent exclusive contracts,—is their second action, asserting the same basic claim of invalidity of National Screen's exclusive contracts, barred as res judicata or may they relitigate the same contention? And does not res judicata apply to those whose participation in the alleged conspiracy was pleaded in the prior complaint though they were not named as parties?

2. Where the prior antitrust suit attacked certain exclusive contracts between respondents concerning the manufacture and distribution of copyrighted advertising poster materials, contending that they constituted a conspiracy in violation of the Sherman Act, and the settlement of the suit was based on a sublicense under which petitioners acquired the materials, are petitioners estopped to sue again and question the validity of the same exclusive contracts between respondents in view of their (a) entering into the sublicense under which they were to acquire not only the materials then being produced under respondents' existing exclusive contracts, but also those as to which additional exclusive contracts might be made by respondents in the future, and (b) voluntarily renewing the license at its expiration, under which license they have been carrying on their business for 12 years to the present time in competition with National Screen,—thus accepting the full benefit of National Screen's business arrangements?

STATEMENT OF THE CASE.

In April 1942, the petitioners and other poster renters brought an antitrust suit for injunction and damages in the District Court for the Eastern District of Pennsylvania against respondent National Screen Service Corporation (National Screen) and three motion picture producers (respondents or affiliates of respondents in the present case) (R. 86 *et seq.*). The gravamen of their complaint was that National Screen had embarked on an "illegal scheme" to monopolize trade in the distribution of certain motion picture poster advertising materials relating to the defendant producers' motion pictures (R. 98-99).

At one time, each of the respondent producers itself manufactured and distributed these copyrighted advertising materials to exhibitors (R. 44).

In 1939, Paramount Pictures, Inc.[1] licensed to National Screen the exclusive right to make and distribute for it, its advertising materials (R. 46, 52). In 1940, RKO Radio Pictures, Inc. (a respondent here) also made an agreement, solely for its material (R. 46, 52). In effect, these two motion picture companies discontinued their own manufacture and distribution of the materials and turned this function over to National Screen.[2]

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1. The then parent of the respondent Paramount Film Distributing Corporation (R. 19).

2. The reasons underlying these decisions by Paramount and RKO Radio appear in the opinion of Judge McGranery in the district court (R. 61). Judge McGranery pointed out that the undisputed facts presented to him showed that the reasons (not only with respect to these producers but also as to those who later licensed National Screen) were legitimate business reasons, that the producers acted independently (R. 69-70), and that National Screen was the only existing concern qualified to undertake the services which the producers required (R. 61). Petitioners have conceded that they "have never manufactured nor do they desire to manufacture any accessories" (R. 61 n. 2).

In December 1940, petitioners started their poster renting business in Philadelphia (R. 43, 47).

Early in 1942, Loew's Incorporated (also a respondent here) entered into an exclusive license agreement with National Screen to manufacture and distribute its advertising material.

Thereafter petitioners brought their 1942 antitrust suit against National Screen, Paramount Pictures, Inc., RKO Radio Pictures, Inc. and Loew's Incorporated.

The complaint in that case (R. 87 *et seq.*) charged that the exclusive licenses from Paramount, RKO Radio and Loew's were illegal and steps in National Screen's program to monopolize the distribution of advertising materials (R. 94, 98) and that by entering into those license agreements the producer defendants had conspired to aid in the establishment of such a monopoly (R. 94, 98-99). The complaint further charged that National Screen was then negotiating with other motion picture producers, specifically naming Universal Pictures Company, Inc., Columbia Pictures Corporation, Twentieth Century-Fox Film Corporation and Warner Bros. Pictures, Inc. (all respondents or affiliates of respondents here) (R. 94-95, 19, 20), and that it was National Screen's declared purpose to obtain exclusive licenses from all producers of motion pictures (R. 95). The complaint concluded with the allegation that the defendants were continuing their "illegal acts and practices", and that unless such acts and practices were restrained, the petitioners would suffer further damage (R. 103).

The complaint therefore sought injunctive relief, both preliminary and permanent (R. 103-105), as well as treble damages. Specifically, petitioners asked that National Screen and the producers which had already licensed National Screen be enjoined from continuing the exclusive license arrangements under attack, and that the court restrain National Screen from consummating any further

exclusive agreements "similar to those alleged herein to be illegal" (R. 104).

One year later, in April 1943, the suit was settled.

The settlement contract (R. 18, 23 *et seq.*), or sublicense agreement as it has been called, recited that National Screen was the licensee **under exclusive licenses** from motion picture producers for the manufacture and distribution of copyrighted material owned by the motion picture producers (R. 23), that it was **anticipated National Screen might in the future enter into exclusive license agreements** with other motion picture producers (R. 24), and that the parties desired to enter into a license for distribution by the petitioners of advertising materials manufactured by National Screen under its then-existing exclusive licenses **as well as under any exclusive licenses which it might acquire in the future** (R. 24).

The sublicense provided that National Screen would supply the advertising materials to the petitioners (R. 25, 26), at prices specified therein (R. 27, 39),—which were lower than the prices poster renters paid when they acquired such materials from motion picture producers which were distributing them (R. 110-113, 130-137). The petitioners covenanted that they would not thereafter contest the validity or scope of the licenses then or thereafter held by National Screen for distribution of advertising materials (R. 26). The sublicense was for a term of three years, to April 30, 1946 (R. 37).

Pursuant to the settlement of the litigation, the case was dismissed by stipulation and order of the court dated April 26, 1943 (R. 84). The dismissal, as provided not only in the stipulation but also in the district court's order, was with prejudice (R. 84).

As had been alleged in the complaint in the prior case and anticipated by the sublicense agreement settling the case, and as petitioners expected and desired (R. 24, 143), National Screen subsequently, and at different times over a period of years, entered into exclusive license agree-

ments with the other producer respondents (or affiliates): Universal in 1944 (R. 53), Columbia in 1945 (R. 51), United Artists and Warner Bros. in 1946 (R. 53), and Twentieth Century-Fox in 1947 (R. 52). When each new license agreement was made, petitioners, as provided in their sublicense agreement, were supplied with materials relating to the pictures of these companies (R. 117).

The sublicense agreement, originally for a term of three years (R. 37), was voluntarily renewed in 1946 by National Screen and petitioners for a further period of five years extending to April 30, 1951 (R. 107, 151), and it will not be disputed that petitioners have been supplied with materials to this date.

More than six years later, in August 1949, while the sublicense agreement was in full force, petitioners commenced their second action under the antitrust laws, the present suit charging the same conspiracy to monopolize by means of the same exclusive agreements which were the subject of their first action.

Their amended complaint (R. 6 *et seq.*) alleges that National Screen has now acquired exclusive licenses from all of the producer respondents (R. 11), and repeats the claim that the exclusive agreements between National Screen and the producers constitute a conspiracy to monopolize (R. 16, 18-20).

As in the prior case, the present amended complaint seeks to enjoin continuance of the exclusive contracts between National Screen and the producers and asks for treble damages (R. 20-22).

The amended complaint pleads the prior action and its settlement, but asserts that petitioners entered into the sublicense agreement "against their will and only because they believed that if they refused to enter into the agreement they would be forced to abandon their business altogether", and that the sublicense was not a fair or equitable settlement of the litigation but was intended to be a means

of perpetuating and extending National Screen's alleged scheme of monopolization (R. 18).

But in depositions both petitioners have admitted, contrary to the allegation in their amended complaint, that they chose to accept the settlement of their "own free will" (R. 122), "voluntarily after considering the matter carefully" (R. 114-115, 129), that the settlement was a business choice made under the guidance of their counsel (R. 116), and that they "were in complete agreement with respect to the settlement that was executed and the release which was given pursuant to it and the stipulation discontinuing the action with prejudice in the Federal Court" (R. 127-128). Moreover, petitioners conceded that most of their co-plaintiffs wanted the settlement (R. 121-122) and that their own counsel had indicated to them that they had no case and that he would withdraw if they did not accept the settlement (R. 147, 122, 140-142).

Petitioners have admitted that from the date of the settlement their business has progressed, earning larger profits as the years went on (R. 116, 149-151). The record shows that their annual gross more than doubled between 1942, the year before petitioners obtained the sublicense, and 1949, the year the present action was commenced (R. 150). And, of course, the profits increased as well (R. 151). Petitioners have never sought cancellation of the settlement agreement (R. 123), nor have they ever taken any legal steps to set aside the settlement (R. 116). On the contrary, they testified that they expected National Screen to live up to the sublicense contract (R. 123, 138).

On respondents' motion to dismiss, Chief Judge Kirkpatrick (R. 76 *et seq.*) held the prior action res judicata of this one on the ground that the same cause of action was asserted in both suits since both were "based upon anti-trust violations by means of the same exclusive license contracts to National Screen" (R. 76-77). The Court of Appeals for the Third Circuit (Judges Goodrich, McLaughlin and Hastie), in an opinion by Judge Goodrich, affirmed unanimously (R. 153 *et seq.*).

SUMMARY OF ARGUMENT.

I. This case does not involve any question of collateral estoppel. Since petitioners' suit is directed against the same alleged conspiracy claimed to have been effectuated by the same exclusive agreements as was their prior suit for injunctive relief, the judgment of dismissal with prejudice of the prior suit is res judicata and a complete bar.

The identity of the present claim with the prior one has been found by both courts below and has been conceded by petitioners in the courts below. The sole distinction asserted by petitioners is that they are seeking damages for a period subsequent to the dismissal of the prior action. Petitioners' present and prior cause of action is and always has been premised upon National Screen's exclusive contracts which petitioners asserted and now again assert constitute an illegal conspiracy violative of the Sherman Act.[3]

The consent dismissal with prejudice of the prior claim for injunctive relief would have no meaning at all, if notwithstanding such dismissal petitioners are permitted to reassert the same contention as to the alleged invalidity of the exclusive contracts and to seek damages for continuation of the very arrangements which petitioners participated in under the license agreement accepted in settlement and in which it was expressly provided that petitioners' sublicense would automatically embrace all future exclusive arrangements procured by National Screen. A holding that dismissal with prejudice of a claim for injunctive relief against an allegedly invalid business arrangement has no effect, would create a serious obstacle to the settlement of litigation and frustrate the policy of

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3. Petitioners' claim was never valid. Among other reasons, exclusive contracts are not illegal per se. **United States v. Bausch & Lomb Optical Co.**, 321 U. S. 707 (1944); **Restatement, Contracts** § 516(e) (1932). Since the only questions involved on this appeal are res judicata and estoppel in pais, we shall not pursue the merits further.

terminating litigation and encouraging settlements. On the other hand, the decisions below, barring these petitioners, are in no way inconsistent with the policy of the antitrust laws because this is an action asserting a mere private right on their part. There is no effect on the rights of other private plaintiffs or on the rights of the United States.

II. Petitioners' claim is and always has been based on the same ground, namely the alleged illegality of exclusive license agreements between National Screen and each of the producer respondents. That claim having been resolved against petitioners and in favor of National Screen by the 1943 judgment, petitioners may not renew the claim of illegality on the ground that some of the producer respondents which are parties to the contracts were not formally named as defendants in the prior action. This is especially so where, as here, the alleged illegal exclusive contracts of the respondents were all specifically charged by the prior action. Reliance on res judicata by the new defendants is fully justified either (1) under modern doctrines which have liberalized the requirement of mutuality or (2) under the traditional exception to that requirement where the liability of the prior defendants is determinative of the liability of the subsequent defendants as it is here inasmuch as the liability of all the respondents is dependent upon their identical relationship with National Screen.

III. Independently of res judicata, petitioners are estopped from maintaining this action. The applicable principle of estoppel is that acceptance of the benefits of a transaction precludes a party from challenging the validity of that transaction. Here, the estoppel arises out of petitioners' sublicense and their voluntary renewal of it in 1946. By the express provisions of the sublicense, petitioners (a) recognized the validity of, and covenanted not to challenge either National Screen's existing exclusive

licenses or any exclusive licenses which it might thereafter acquire, (b) obtained a supply of materials manufactured under the existing exclusive licenses, and (c) acquired the right to obtain, and did obtain a supply of materials manufactured under exclusive licenses thereafter entered into by National Screen with other producer respondents. Having voluntarily, and under the advice of their own counsel, entered into the 1943 settlement and accepted its benefits, petitioners may not now attack the very same exclusive licenses on which that settlement was premised. The respondents may not thus be punished for buying their peace.

Argument.

I.

THE DISMISSAL WITH PREJUDICE OF THE PRIOR ACTION IS RES JUDICATA AND A BAR TO THIS ONE.

The judgment below, and its unanimous affirmance by the court of appeals, rested solely and firmly on the identity of the present cause of action with that in the prior case and the consequent effect of the 1943 dismissal with prejudice as res judicata of the present action.[4]

The identity of the cause of action was cogently described by the trial judge. He said (R. 78-79):

> "The cause of action asserted in the present case is, to all intent and purposes, identical with that of the 1942 action. **The conspiracy charged is the same conspiracy. The contracts by which it was alleged to have been accomplished are the same contracts; and the same evidence, the same witnesses and the same documents would be necessary in the trial in both cases.** The fact that additional defendants have been added does not change it. The unlawful acts charged against the defendants in the 1942 action were not merely the making of the consummated and then existing license contracts with three of the present defendants, **but the complaint also charged that those licenses were a step in a general illegal scheme of monopolization and that the defendants were at that time engaged in the process of extending the monopoly** by negotiating similar contracts with other major producers, by which National Screen would acquire the exclusive distribution of all motion

4. There is no question of collateral estoppel in this case,—as both of the courts below readily recognized (R. 78, 154).

> picture advertising matter. The additional defendants sued in the present action are, admittedly, the other major producers referred to. * * *"[5]

The court of appeals not only agreed but, supplementing Judge Kirkpatrick's view, said (R. 157):

> "* * * But we think in substance the complaint is the same and that what plaintiffs object to is an alleged combination of the defendants to do illegal things harmful to the plaintiffs' business and acts done pursuant to that combination. Since plaintiffs by their consent judgment in 1942 had an adjudication against their claim at that time we do not think they improve their position by reiterating essentially the same complaint in 1949."

In light of the foregoing statement, petitioners are in error when they assert (p. 7) that the court of appeals failed to answer in direct terms the question whether the cause of action is the same.

Indeed, in the courts below, petitioners themselves conceded the identity of the basic claim asserted in the prior and present actions. Thus, in their court of appeals brief, petitioners admitted (p. 6 n. 6):[6]

> "Plaintiffs concede that the exclusive license agreements on which this [prior] action was based were substantially the same as the contracts on which the instant action is based. In fact, in the case of Loew's the same contract appears in both actions."

Moreover, one of the petitioners himself testified that he understood the grievances which he was asserting in the

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5. Wherever boldface type is used in this brief, the emphasis is ours.

6. Copies of petitioners' brief to the court of appeals have been lodged with the clerk of this Court.

prior action and that he knows the same grievances are asserted in the present action (R. 126).

In an effort to create the appearance of different causes of action, petitioners speciously argue (p. 7) that since the damages they now seek for a period subsequent in time to the prior judgment could not have been included in the first action, "therefore the causes of action could not have been the same".

But petitioners disregard the crucial fact that a consent judgment with prejudice is the "equivalent of a retraxit at common law" [2 **Freeman, Judgments** § 757 (5th ed. 1925)] and amounts "to such an adjustment of the merits of the controversy * * * as will constitute a defence to another action brought upon the same cause of action." **United States v. Parker,** 120 U. S. 89, 95 (1887). Consequently, the prior judgment judicially established **between the parties** that the exclusive agreements between National Screen and the producer respondents did not constitute an actionable conspiracy against petitioners. Accordingly, there can be no alleged damages for any subsequent period arising out of agreements which the prior consent judgment adjudicated were not wrongful or actionable.

Petitioners' only contention in seeking reversal of the judgment below is that the district court and the court of appeals were wrong in holding that petitioners' present suit is on the same cause of action as their prior one. The only cases cited by petitioners as supporting the contention that there is a new cause of action are **Lawlor v. Loewe,** 235 U. S. 522, 536 (1915), and **Connecticut Importing Co. v. Frankford Distilleries,** 101 F. 2d 79, 81 (2d Cir. 1939). But neither case dealt even remotely with identity of causes of action. The sole question in both cases was the right of a plaintiff, who had established a violation of the antitrust laws, to recover damages accruing after commencement of the action. In the instant case, petitioners are attempting to maintain an action based on the same exclusive contracts

which the judgment in the prior action established were not tortious as against them. Where a wrong has been established, its continuance remains actionable. Where the status of certain contracts has been held lawful, their continuance cannot become actionable (see Judge Kirkpatrick's analysis, R. 79-80).

United States v. International Building Co., 345 U. S. 502 (1953), upon which petitioners rely, involves the doctrine of collateral estoppel arising out of a prior determination of a fact in a trial of a different cause of action.

In the present action, the courts below correctly concluded that the causes of action being identical it was unnecessary to inquire whether collateral estoppel could be invoked since the more comprehensive principle of res judicata was clearly applicable. It was because res judicata applied,—and not collateral estoppel,—that both courts below relied upon **United States v. Parker**, 120 U. S. 89 (1887), and deemed **United States v. International Building Co.**, 345 U. S. 502 (1953), inapplicable (R. 78, 155).

In contending that there are different causes of action, petitioners also ignore the fact that their prior action sought **injunctive relief which, if granted, would have restrained the very same exclusive agreements of which they complain in their present action.** It is the accepted general rule that a judgment **for the defendant** in a suit seeking injunctive relief is a bar to relitigation of the same claim. **Restatement, Judgments** § 46, comments *a*, *b* (1942). Significantly, petitioners fail to cite a single case involving a claim for injunctive relief.

If petitioners were permitted to maintain their present action, it would necessarily mean that the dismissal with prejudice of the prior action for **injunctive** relief was without significance. Petitioners could have accepted the sublicense agreement, gone through the motions of the dismissal with prejudice, and the very next day started a new

antitrust suit for the identical injunctive relief which they had abandoned with prejudice the day before.

Such conduct would shock the conscience of equity. And a rule of law permitting it would have far-reaching consequences. If this Court should hold that a voluntary dismissal with prejudice of a claim for injunctive relief does not bar reassertion of the same claim at a later date and bar recovery of damages thereafter accruing, it will be impossible to settle many cases, private antitrust cases in particular.

There are many situations in which a plaintiff who challenges the lawfulness of a course of conduct is willing that it continue **insofar as he is concerned** if he obtains sufficient concessions from a defendant desirous of avoiding burdensome litigation. But incentive for buying one's peace would be destroyed if settlement were merely entrapment, and the grievance survived the mutual intention of the parties to terminate the quarrel. Such a rule would be contrary to public policy which encourages settlement of litigation.

Respect for the doctrine of res judicata does not violate the policy of the antitrust laws, nor is it inimical to their enforcement, as petitioners suggest (p. 8). This is purely a private suit in the business and pecuniary interest of these petitioners, barred by the rulings of the courts below solely because of these petitioners' own deliberate conduct, their own voluntary agreement in 1943 that it should be barred. Others who think themselves aggrieved are free to sue.[7] The United States is free to sue. In **this** case we are concerned solely with the unconscionable insistence of the present petitioners,—who voluntarily settled

7. This is a particularly significant consideration in the present case because there are four companion cases, brought by poster renters, pending in the district court, in which no res judicata defense has been or can be asserted (Civil Action Nos. 11,138, 11,376, 11,597, 11,678).

their claim, entered judgment dismissing the complaint with prejudice, accepted the benefits of a settlement contract, and renewed their sublicense agreement three years later,—that they may at the same time disregard judgment and settlement benefits and sue again on the same grievance.

II.

THE ALLEGED CO-CONSPIRATORS WHO WERE NOT MADE PARTIES TO THE PRIOR ACTION MAY ALSO RELY ON THE DEFENSE OF RES JUDICATA.

Three of the producer respondents (or affiliates) were named as parties to the prior action. The claim there, for injunction against producers' continued use of National Screen to perform their former functions in the production and distribution of advertising materials, was dismissed with prejudice in exchange for an agreement that National Screen would thereafter supply the materials to petitioners. Stated differently, petitioners dismissed with prejudice their action to enjoin continuation of an alleged conspiracy to permit National Screen to monopolize the distribution of the advertising poster materials by obtaining exclusive licenses from **all** motion picture producers.

Had petitioners been able to establish their claim, not only would the three then-existing licenses have been enjoined, but National Screen would have been enjoined also from entering into the later exclusive contracts with the other five producer respondents. But the consent judgment of dismissal judicially established that the later contracts could not be enjoined by these petitioners. The mere circumstance that petitioners failed to name some of the producers as formal parties defendant in the prior action cannot vitiate the legal effect of the judgment to which petitioners consented.

Petitioners, realizing the force of these facts, did not even raise or argue this question in the court of appeals.[8] That court nevertheless did discuss and approve the district court's holding.

The district court and the court of appeals, in holding petitioners barred as against all respondents, adopted and followed the reasoning of Judge Hastie in the case of **Bruszewski v. United States**, 181 F. 2d 419 (3d Cir. 1950), *cert. denied*, 340 U. S. 865 (1950). In that case, Judge Hastie rejected the technical requirement of mutuality as a condition to use of res judicata as a bar. A longshoreman, injured while working on a vessel owned by the United States, sued the steamship company which was servicing the ship under a General Agency Service agreement. When he lost that suit, he sued the United States for the same injury. The court held that he was barred by the prior decision, even though there was no mutuality (since the United States would not have been bound by a judgment against the steamship company) and no privity between the United States and the steamship company. Judge Hastie said, 181 F. 2d at 422:

> "Where different plaintiffs sue the same defendant in successive suits, many courts have questioned the fairness of invoking *res judicata* against the defendant unless a significant relationship can be found between the plaintiffs. But where, as in this case, *res judicata* is invoked against a plaintiff who has twice asserted essentially the same claim against different defendants, courts have, as indicated in the cases above cited, enlarged the area of *res judicata* beyond any definable categories of privity between the defendants. Certainly the cases already cited show that the moving party has been bound by prior adjudication against him in situations where the relation between successive

8. See their brief in that court, copies of which have been lodged with the clerk of this Court.

defendants was no closer or more significant than that between the United States and Isthmian Steamship Company here. We are in accord with this development of the law away from formalism which impedes the achievement of fair and desirable results."

Similar reasoning has been adopted by other courts. **Coca Cola Co. v. Pepsi Cola Co.**, 36 Del. 124, 172 A. 260 (1934); **Good Health Dairy Products Corp. v. Emery**, 275 N. Y. 14, 18, 9 N. E. 2d 758, 759 (1937). *Cf.* the opinion of Judge Augustus Hand for the court in **Adriaanse v. United States**, 184 F. 2d 968 (2d Cir. 1950).

Under the view of these cases, the petitioners here are barred as against all respondents, without regard to the factual relationship among the respondents under petitioners' own allegations. That view, as so forcefully presented in Judge Hastie's **Bruszewski** opinion, best serves the policy of ending litigation and should, we submit, be approved by this Court.

However, it is not necessary in this case to go that far, because here the relationship of all the producer respondents to National Screen is such that the case falls within a well established exception to the requirement of mutuality, —an exception which this Court recognized in **Bigelow v. Old Dominion Copper Mining and Smelting Co.**, 225 U. S. 111 (1912), relied on by petitioners (p. 8).

In the **Bigelow** case, an action was brought in a federal court in New York against Lewisohn to recover unlawful profits realized by him and his associate, Bigelow. A similar action was brought in a Massachusetts court against Bigelow. In the New York action Lewisohn's demurrer was sustained. The Massachusetts court held that Bigelow was not protected by the judgment in favor of Lewisohn in the federal court in New York. This Court affirmed, holding that the full faith and credit clause of the Constitution did not require the Massachusetts court to hold the

New York judgment in favor of Lewisohn a bar to the Massachusetts action by the same plaintiff against Bigelow. While reaffirming and applying the rule that the applicability of res judicata generally requires mutuality, the Court recognized (225 U. S. at 127-128) that:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependant upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff. See *Portland Gold Mining Co. v. Stratton's Independence*, 158 Fed. Rep. 63, where the cases are collected. The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. * * *"

In holding that the case before it fell within the rule rather than the exception, the Court said, at 128:

> "It is too evident to need argument that the remedy of this plaintiff does not depend upon the culpable conduct of Lewisohn, but upon Bigelow's own wrong, whether alone or in cooperation with Lewisohn. * * *"

Under the facts of the instant case, as pleaded in the prior and present complaints, the producer respondents could not have been liable to petitioners if National Screen was not liable, since the gravamen of the complaint was the contracts between National Screen and the producers. Thus, petitioners' remedy against any producer must depend on the producer's action in entering into a contract with National Screen and cannot depend on the producer's action alone. See **Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.**, 248 U. S. 55, 62 (1918).

In short, the liability of the additional producers who have been named in the present action "is altogether de-

pendant upon the culpability of" National Screen and therefore unilateral application of res judicata against petitioners, who dismissed their prior action against National Screen, is justified.[9]

The exception to the general rule of mutuality noted in the **Bigelow** case has a long history and a considerable body of supporting authority. See, as typical cases in which mutuality of estoppel has been held not necessary for the application of res judicata, **Bernhard v. Bank of America**, 19 Cal. 2d 807, 122 P. 2d 892 (1942); **Silva v. Brown**, 319 Mass. 466, 66 N. E. 2d 349 (1946); **Jones v. Valisi**, 111 Vt. 481, 18 A. 2d 179 (1941). In **Bernhard v. Bank of America**, *supra* at 812-813, 122 P. 2d at 895, the court expressed the rule as follows:

> "* * * The courts of most jurisdictions [have recognized] a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. * * * The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries."

It is apparent from review of the cases cited under this point of our argument that the overwhelming judicial tendency has been to find a way to grant relief against the kind of repetitious litigation which would be permissible under strict application of the mutuality requirement. The

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9. It is perhaps unnecessary to add that the applicability of res judicata in the present case would not be affected by the fact that the first suit was disposed of by petitioners' consent. **Portland Gold Mining Co. v. Stratton's Independence**, 158 Fed. 63, 65 (8th Cir. 1907), cited in the **Bigelow** case.

legal paths to that result have varied. The **Bruszewski** view completely discards the requirement of mutuality. Other cases recognize the requirement, but allow an exception for dependent liability. And even those authorities which pay complete lip service to technical mutuality still reach a desirable result by a broad approach to the concept of "privity". See Judge Goodrich's concurring opinion in the **Bruszewski** case, 181 F. 2d at 423; **Emery v. Fowler**, 39 Me. 326 (1885), and the cases there discussed (pp. 329-331).

But whatever the legal path, the result is the same. The facts of this case require that result. For here the prior judgment has judicially established that petitioners have no cause of action based on the exclusive contracts. Therefore, all of the respondents which are parties to such contracts are entitled to the bar of the 1943 judgment. The trial court and the court of appeals properly so held.

III.

PETITIONERS ARE ESTOPPED FROM MAINTAINING THE PRESENT ACTION BY THEIR ACCEPTANCE, RENEWAL AND RETENTION OF THE BENEFITS OF THEIR SUBLICENSE FROM NATIONAL SCREEN.

Independently of res judicata, petitioners are barred from maintaining the present action by estoppel in pais,—under the familiar principle that one who accepts the benefits of a transaction with full awareness of the facts may not thereafter be heard to challenge the validity of the transaction.

In this case, in voluntarily and deliberately settling and terminating the prior action petitioners not only consented to entry of the judgment of dismissal with prejudice, but at the same time obtained a sublicense agreement from National Screen (R. 18) which gave petitioners a full supply of the materials which National

Screen manufactured under its exclusive agreements with the producer respondents (R. 23-40). Moreover, in that very sublicense agreement, petitioners not only expressly recognized the validity of respondents' then existing and future exclusive contracts and covenanted not to challenge them (R. 26) but procured thereunder the right to receive,—and did in fact receive (R. 117),—from National Screen all materials which National Screen thereafter manufactured under subsequently acquired exclusive contracts with other motion picture producers (R. 24, 26).

Furthermore, shortly prior to May 1946, when the original sublicense agreement with petitioners would have terminated, petitioners procured from National Screen a renewal of the sublicense (R. 107, 151).

Three years later, in the midst of the renewal period, petitioners instituted the present action for triple damages in which they attack as invalid the very same exclusive contracts which they have expressly agreed were valid as to them. The law is clear that by the acceptance of the sublicense and its renewal, petitioners are estopped from challenging the validity of the exclusive contracts out of which National Screen's sublicense to petitioners arises.

This Court has applied this principle in a case in which the plaintiff sought to set aside a settlement of prior litigation. In **McLean v. Clapp**, 141 U. S. 429, 432-433 (1891), it was held:

> "• • • The settlement was a new contract between [plaintiff] and Clapp, and the law is clear that he cannot take the benefits of that contract and repudiate its burdens. • • •
>
> "• • • His conduct, after full knowledge, ratified and affirmed the settlement • • •".

In **United States** *ex rel.* **The International Contracting Co. v. Lamont**, 155 U. S. 303 (1894), this Court held that the International Company, which had entered into and performed a dredging contract, was estopped to assert the in-

validity of that contract and to claim higher compensation on the basis of a previous bid which had not resulted in a contract. Mr. Justice White explained the estoppel principle as follows, at 309-310:

> "* * * He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. * * * Nor does the fact that in making his second contract, the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences. * * *"

A case strikingly in point on the application of estoppel in an antitrust case is **Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd.**, 185 F. 2d 196 (9th Cir. 1950), *cert. denied*, 340 U. S. 943 (1951). There, plaintiffs charged a conspiracy to monopolize the mining, processing and distributing of borax. Although the conspiracy was alleged to have begun in 1929 and continued until 1945 (185 F. 2d at 199-200), the court held that the plaintiffs were bound by a general release given in 1942. The complaint alleged that the conspiracy and the acts of monopolization which had continued until 1945 included coercive inducement of the 1942 release (*id.* at 200). Simultaneously with the giving of the release, the plaintiffs had entered into an agreement with one of the defendants, whereby plaintiffs sold certain property. The court referred to this agreement as a "settlement agreement" (*id.* at 201), but it did not have the striking additional attributes of the instant

settlement agreement which expressly recognized the validity of the exclusive contracts and any future contracts with other producers for the right to manufacture their poster advertising accessories.

Nevertheless, the court held that this agreement in conjunction with the release as to past grievances constituted a complete defense. The language of the court of appeals (185 F. 2d at 208) is precisely pertinent here:

> "The record induces the firm conviction that by the 1942 agreement and sale, the parties thereto were voluntarily wiping the slate completely clean of controversies by a full settlement of any and all existing differences between them. **We are not aware of any principle of law which requires private monopolists to be treated in any different fashion than other tort feasors in the matter of entering into binding private settlement agreements arising out of demands against them for damages.** Such settlements in no wise obstruct possible criminal prosecutions which might be instituted by the Government, nor do they defeat the Congressional purpose of allowing private claimants in this class of actions the right of redress of their grievances in our courts. * * *"

For additional cases to the same effect, see **Insurance Co. v. Mowry**, 96 U. S. 544, 547 (1877); **Dickerson v. Colgrove**, 100 U. S. 578, 580 (1879); **Mahoning Investment Co. v. United States**, 3 F. Supp. 622 (Ct. Cl. 1933), *cert. denied*, 291 U. S. 675 (1934); **Chipman v. Montgomery**, 63 N. Y. 221, 234-235 (1875).

Since the courts below deemed res judicata completely dispositive of the cause, they did not deal with the doctrine of estoppel, although the district court reviewed the elements of estoppel present in this case (R. 83). We submit that the estoppel arising from these elements likewise precludes maintenance of this action and therefore provides an additional, independent ground in support of the judg-

ment below. This Court, of course, may affirm that judgment on any ground. **Ryerson v. United States**, 312 U. S. 405, 408 (1941).

CONCLUSION.

Affirmance is earned first, on the traditional legal doctrine which seeks to put terminus and finality to litigation and abjures relitigation under whatever devious guise; and second, on the traditional equitable doctrine that one may not enter into a settlement, persist in its gains for a decade, and simultaneously attack it collaterally without disavowing its continuing benefits and seek punitive relief as if such settlement had never been made.

Respectfully submitted,

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